

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

CITY OF ROCKFORD,) Docket No. 17 C 50107
)
Plaintiff,) Rockford, Illinois
) Tuesday, January 30, 2018
v.) 1:30 o'clock p.m.
)
MALLINCKRODT ARD, INC.,)
et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE IAIN D. JOHNSTON

APPEARANCES:

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6 United BioSource (155 North Wacker Drive,
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9 MR. ERIC J. GORMAN
10 (4 Times Square,
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12 MR. MATTHEW M. MARTINO

13 Also Present: MR. DAVID HUNDLEY
14 Counsel for MSP Plaintiffs

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25

1 (The following is from a tape-recording of proceedings:)

2 THE CLERK: Calling 17 CV 50107, City of Rockford v.
3 Mallinckrodt ARD, Inc., et al.

4 THE COURT: All right. Hold on one second. I need
5 to make a scorecard again.

6 All right. Let's have people step up and get
7 appearances. Plaintiff on that side, Defendants on that side.

8 MR. MOGBANA: Good morning, Judge. Ifean Mogbana for
9 the City of Rockford.

10 THE COURT: Good morning, Mr. Mogbana -- or good
11 afternoon, Mr. Mogbana.

12 MR. HAVILAND: Good morning, your Honor. Don
13 Haviland for the City of Rockford.

14 THE COURT: Hold on one second.
15 Okay.

16 MR. MINCIELI: Jonathan Mincieli, Meyers & Flowers,
17 for the City of Rockford.

18 THE COURT: Where did you go? There you are.
19 Okay.

20 MR. HUNDLEY: Good afternoon, your Honor. David
21 Hundley on behalf of the MSP Plaintiffs in the related case
22 that's part of the motion in front of you this morning.

23 THE COURT: You know what is going to be a problem?
24 When just the attorney list goes on double digits -- eight
25 pages -- or nine pages.

1 Okay. What was that again?

2 MR. HUNDLEY: David Hundley, H-u-n-d-l-e-y.

3 THE COURT: Hundley, okay.

4 MR. HUNDLEY: Okay.

5 THE COURT: All right. For the -- we will call
6 you the "new folks."

7 MR. HUNDLEY: Fair enough.

8 THE COURT: MSP. Okay.

9 MR. SULLIVAN: Good afternoon, your Honor. Scott
10 Sullivan for the Mallinckrodt Defendants.

11 THE COURT: Good afternoon, Mr. Sullivan.

12 MR. WATSON: Tom Watson from Bryan Cave for the
13 Mallinckrodt Defendants.

14 MR. GIORGIO: Good afternoon, your Honor. Herb
15 Giorgio, Bryan Cave, for the Mallinckrodt Defendants.

16 MR. GORMAN: Good afternoon, your Honor. Eric
17 Gorman, Skadden Arps, on behalf of the Express Scripts
18 Defendants.

19 THE COURT: Hold on one second.

20 MR. MARTINO: Good afternoon. Matthew Martino from
21 Skadden Arps on behalf of the Express Scripts Defendants.

22 THE COURT: Okay. So we have got Mallinckrodt,
23 Express Scripts. That's on that.

24 Then we have the City of Rockford and then the new
25 folks.

1 First thing -- I have got to find something easy to
2 do. I had something easy to do. We had a briefing schedule
3 cooking, but that might go sideways now.

4 I can't rule on the motion to transfer. That has got
5 to be ruled on by Judge Kapala, unless you consent to me, and
6 I don't think that's going to happen.

7 Can we talk about it a little bit? So you filed in
8 California.

9 MR. HUNDLEY: Correct, Judge.

10 THE COURT: Mr. Hundley, you filed in California.
11 Which district?

12 MR. HUNDLEY: The Central District.

13 THE COURT: Okay. The Central District. It is filed
14 there. It is removed to the Northern District of Illinois
15 by -- who filed that motion?

16 MR. HUNDLEY: The Defendants.

17 MR. WATSON: We filed a motion to transfer -- the
18 Defendants jointly filed a motion to transfer under the
19 first-to-file doctrine.

20 THE COURT: Okay.

21 MR. WATSON: And so it was moved to Illinois.

22 THE COURT: In that whatever was filed, did it
23 specify eastern or western division?

24 MR. WATSON: I don't believe that it specified either
25 way. I think it said Northern District of Illinois. It gave

1 the case citation and talked about the Rockford v.

2 Mallinckrodt and Express Scripts cases.

3 THE COURT: Okay.

4 MR. WATSON: And --

5 THE COURT: Was it your intent to bring it here, or
6 poor Judge Alonso probably was thinking, "Well, what did I do
7 wrong to catch this?"

8 MR. WATSON: It was our intent to bring it here.

9 THE COURT: Okay. Just checking.

10 MR. WATSON: Because we were trying to -- the whole
11 idea was judicial efficiencies and economies of scale,
12 judicial economy, and so on and so forth, and to make sure we
13 didn't end up with inconsistent rulings. So we wanted it in
14 front of the same court is the bottom line.

15 THE COURT: Okay. All right. Judge Alonso is an
16 excellent judge. He is a good Blackhawks fan, and he has good
17 taste in music.

18 So you don't want to be in front of Judge Alonso or
19 you do?

20 MR. GORMAN: No, Judge, I think when the assignment
21 first came out, because of the geographical interests of my
22 client and those attorneys involved, we were a bit seduced by
23 the idea of our assignment to Chicago, which is why we didn't
24 initially agree to the motion.

25 But upon reflection, I think that the intent of the

1 California court's order certainly is to have the cases
2 litigated together. So we don't intend to file any sort of
3 opposition or to further oppose the --

4 THE COURT: Okay. All right. I will break the news
5 to Judge Kapala.

6 All right. So, good, that turned out to be easy.

7 What are you cooking up as far as a response
8 to -- now that the case is going to be here -- I haven't
9 looked at it in detail. Are we going to have more motions?
10 Do you want to have them joined? Do they need to be slightly
11 tweaked? Do we need a whole new briefing schedule? What are
12 your thoughts?

13 MR. WATSON: And I'm speaking for Mallinckrodt right
14 now, and so I will let Express Scripts speak for themselves.

15 Our thought -- well, first of all, we had filed a
16 motion to dismiss in this case. Under the current schedule as
17 was set in California and transferred to Chicago, and I guess
18 now will be reassigned to here, our motions in that case are
19 due on the 23rd of February, and we are perfectly willing and
20 able to meet that date, unless there is going to be some
21 consolidation or -- I don't know whether the MSP Plaintiffs
22 intend to file any amended complaint before then, but we are
23 ready to go on that. We can file it by that deadline.

24 THE COURT: Okay.

25 MR. WATSON: We do think it makes sense to line up

1 the responses, though, to try to get the briefs on the same
2 schedule.

3 THE COURT: Yes.

4 MR. WATSON: And we, at least from our perspective,
5 are willing to give the Rockford Plaintiffs more time, if
6 that's what's necessary, to get that done, and we have not
7 talked to them about a briefing schedule yet.

8 THE COURT: Okay.

9 MR. HAVILAND: Your Honor, Don Haviland for the City
10 of Rockford.

11 So we have amended our complaint, as the court may
12 have seen. We added a Plaintiff called "Acument" --

13 THE COURT: Yes.

14 MR. HAVILAND: -- who has a substantial stake in the
15 case. We don't intend to amend again, and I don't think that
16 consolidation is in the cards for us. The MSP Plaintiffs'
17 case is different in terms of their standing. Their role in
18 this case is different from Rockford and Acument. Their
19 allegations were gleaned off of ours, so there is some
20 parallel. I don't disagree that we should have those briefs
21 move pace.

22 We have the motion to dismiss of the Defendants, and
23 we are currently preparing our opposition, which I think is
24 about that time frame that they would be filing the motion
25 against the MSP Plaintiffs.

1 So we are probably looking, if you adopt that
2 schedule, at about a month delay, which puts the hearing off
3 into the summertime.

4 But I would be amenable --

5 THE COURT: There will be a hearing, just so you
6 know.

7 MR. HAVILAND: Okay.

8 THE COURT: I'm not ruling on it. Judge Kapala -- it
9 will get put on Judge Kapala's giant stack, and he will rule
10 on it.

11 MR. HAVILAND: So our briefing probably goes to about
12 April, May, and then the matter will be ready for a ruling by
13 the court.

14 Yes, our response is due March 5th currently, per the
15 court's order, and replies due April the 3rd. So if the
16 defense were to file on February the 23rd, and we backed up
17 our opposition to the end of March, we could put the replies
18 to the end of April just to stay on track.

19 MR. WATSON: I think that's right.

20 MR. HAVILAND: I would note that there are some
21 differences in the case in terms of Express Scripts. We have
22 an array of Express Scripts companies, the MSP Plaintiffs. I
23 don't know if that is going to necessarily impact the motions,
24 but I'm sure Express Scripts will raise that for the court in
25 their papers.

1 THE COURT: I was going to ask them what their view
2 was.

3 Express Scripts, what do you --

4 MR. GORMAN: We have no objection to that schedule.
5 That works for us.

6 THE COURT: What I would really like to avoid is
7 having the Defendants start looking at things and they look at
8 a slightly different method. I'm not saying that in a
9 pejorative way. It is just when you have had the opportunity,
10 you start thinking about it, you start putting pen to paper,
11 and you go, "It is kind of a little different. I want to
12 do -- I'm viewing things, I'm viewing litigation differently,"
13 and then you want to file something different.

14 If we just scrap the briefing schedule, we are not
15 going to lose any ground on anything, you are not going to
16 lose your place in line, and we can start up with a whole new
17 briefing schedule, if that makes sense. I'm just throwing it
18 out there. I don't want to make any additional -- I don't
19 want to make any additional work for anybody, but what I don't
20 want happening is midstream all of a sudden we start amending
21 briefings and we end up taking longer than we would have if we
22 would have just started from scratch again.

23 MR. HAVILAND: If it is helpful, your Honor, from the
24 City's perspective, we don't intend to amend the complaint
25 again. We spent some time on that amendment.

1 THE COURT: Okay.

2 MR. HAVILAND: We had the first motion to dismiss to
3 guide us, and of course we added a new client, and that's
4 going to be the sum total for this point. So we have their
5 motion to dismiss. So I don't think there is going to be any
6 changes.

7 THE COURT: And the motion to dismiss isn't going to
8 change at all with the addition of the new Plaintiff?

9 MR. WATSON: Well, our motion to dismiss reflected
10 the new Plaintiff in the Rockford case. I don't foresee any
11 changes that would need to be made to the Rockford briefing as
12 a result of the MSP complaint.

13 THE COURT: Okay.

14 MR. WATSON: If MSP, as I said earlier, wants to
15 amend their complaint for whatever reason, that might change
16 something, but I can't envision how it would possibly change
17 what we have already said in our Rockford motion to dismiss.

18 THE COURT: Does MSP have any inkling on filing an
19 amended complaint?

20 MR. HUNDLEY: Judge, I wish I could report that with
21 specificity. I have jumped into this, being the Chicago
22 lawyer in our group, so I can't say one way or the other.

23 I know that we have made some amendments with regard
24 to just more sort of housekeeping matters as it relates to the
25 Plaintiff entities.

1 So I can't say right now if those have already been
2 made in this particular case. I believe that they have. So
3 my guess is that we do not intend to file an amendment.

4 THE COURT: Okay. So tell me your folks' proposed
5 briefing schedule. How do you want to handle it? It sounds
6 like you are all in agreement. We can do it this way. I'm
7 not going to force dates on you right now because there is too
8 many lawyers, too many calendars. Why don't you look at it
9 and tell me. You start proposing what it looks like, and we
10 will go with that.

11 MR. HAVILAND: So, again, your Honor, for the City of
12 Rockford, we are prepared to file our opposition on March the
13 5th. Any additional time is not going to make a difference in
14 our world.

15 If Mallinckrodt wants to hold the schedule from
16 California, I guess we are going to key off of that in terms
17 of the two rounds of briefs.

18 THE COURT: All right. And you want to use that
19 February 23rd date and jump off of that?

20 MR. WATSON: We are fine -- we are fine with filing
21 on the 23rd and keying the responses off of that date and the
22 reply off of that date.

23 THE COURT: Okay. And what's your -- I have a reply
24 date for you to the 3rd, April 3rd?

25 MR. WATSON: April 3rd. I think it is, yes,

1 March 5th and April 3rd.

2 THE COURT: That's correct. I got it. Okay.

3 April 3rd.

4 So 2/23/2018 for that motion.

5 And then how much time to respond to the motion?

6 MR. HAVILAND: Your Honor, consulting the electronic
7 calendar to my left, I see --

8 THE COURT: That's why you print them out. Never
9 bring your -- just print them out when you come in.

10 MR. HAVILAND: The 30th falls on a Friday, of March,
11 and then April 30th is a Monday. So that avoids some weekends
12 in terms of pushing back, roughly, three and a half weeks.

13 THE COURT: Okay. So what day do you want?

14 MR. HAVILAND: I just proposed March 30th and
15 April the 30th, March 30th for the oppositions, April 30th for
16 the replies.

17 THE COURT: Does that work?

18 MR. WATSON: That's fine with us.

19 THE COURT: March 30th, 2018.

20 April 30th for replies.

21 All right. We have got a new party in one case, a
22 whole new case. What type -- I don't know if that changes any
23 of your initial disclosures, maybe a little bit, tweaks it a
24 little bit.

25 What do we do for initial disclosures with the new

1 Plaintiffs?

2 MR. HAVILAND: So we have done our disclosures. Your
3 Honor's order was clear about that. And from both Acument's
4 standpoint and Rockford's, we have amended, and then we have
5 done the disclosures for Acument. So we are done.

6 THE COURT: Okay.

7 MR. WATSON: And in Mallinckrodt, we filed our
8 disclosures, and I don't foresee any changes that will be
9 needed to the disclosures we did for Rockford because of MSP.

10 THE COURT: Okay.

11 MR. WATSON: We have not done an MSP disclosure.

12 THE COURT: Okay. All right.

13 MR. GORMAN: That's the same for the Express Scripts
14 Defendants.

15 THE COURT: Okay. New folks, what are you looking at
16 as far as 26(a)(1) disclosures? When can you get those over
17 to the Defendants?

18 MR. HUNDLEY: I'm thinking, Judge, if you could give
19 us like somewhere in the neighborhood of 21 days? That would
20 be the 20th of February.

21 THE COURT: February 28th, 2018, 26(a)(1)s.

22 Okay. Anybody anticipate anybody else joining the
23 fray?

24 MR. HAVILAND: Not in this case, your Honor, but we
25 have made clear to the court and to the Defendants we do

1 represent other clients, municipalities, third-party payors.
2 At this point, we don't want to turn the pleadings into a
3 never-ending case of amendments, but those clients are making
4 decisions about what to do.

5 You see that with Acument, it is a Detroit-based
6 company that has operations in Belvidere, down the road.
7 That's where their HR is. So it made a lot of sense to have
8 them join here.

9 There may be other cases filed in state court since
10 some of those clients have smaller claims, but we would talk
11 with the Defendants first about coordinating all efforts here.
12 The intent is not to get ahead of this case or to conflict
13 with it, but we have got our clients that are dealing with
14 this situation on a granular basis. I just wanted to echo
15 what I said to the defense all along, that we have those
16 clients that we are representing, and this is the case that we
17 are proceeding with on a class-wide basis.

18 THE COURT: Okay. What are your guys' thoughts?

19 MR. WATSON: Other than what counsel just said, we
20 don't have any knowledge of any other potential cases being
21 filed.

22 MR. HAVILAND: And we haven't heard of any either,
23 your Honor, outside of the parties represented here.

24 THE COURT: It has been a while since I looked at
25 your motions to dismiss. I know they are -- Judge Rowland

1 uses the word "fulsome."

2 What were the issues?

3 MR. WATSON: Well, in the first one, from the
4 Mallinckrodt standpoint, was Illinois Brick, which I think we
5 talked about a lot the last time --

6 THE COURT: Yes.

7 MR. WATSON: -- and the whole standing issue.

8 And then there were failure-to-state-a-claim
9 arguments with respect to both the distribution system
10 arguments and their arguments relating to the acquisition of
11 an allegedly competing drug.

12 And then with respect to the state law antitrust
13 claims, there are standing arguments and some substantive and
14 procedural arguments depending on the state.

15 And then RICO, it was essentially failure to
16 state -- or to prove our alleged enterprise and causation,
17 various failure-to-state-a-claim arguments.

18 THE COURT: Okay.

19 MR. GORMAN: For Express Scripts, your Honor, we
20 moved on many of the same grounds. In addition, we moved to
21 dismiss the breach-of-contract claim that Rockford has brought
22 against Express Scripts, Inc.

23 THE COURT: I'm going to kick myself for asking this:
24 Other than 26(a)(1) disclosures, do you want to move forward
25 with discovery; and, if so, on what issues? Do you want to

1 phase it, do you not want to phase it, both as far as
2 procedure and subject matter?

3 MR. HAVILAND: The good news is, your Honor, we have
4 made progress. When we were last in front of you, we thought
5 we were going to get a motion from the foreign company, the
6 PLC, that would have raised jurisdictional discovery issues.
7 So we did not get a 26(b)(2) motion or a 12(b)(2) motion. So
8 that's off the table.

9 When I last spoke with the court, I framed it as
10 three different buckets that we were interested in, that I
11 think are very simple and straightforward and actually go to
12 the issues that we just raised, and I will make that point.

13 The number one group of documents is the contracts
14 between the Defendant parties, beginning with the 2007
15 contract. I believe there was an amendment in '08. And then
16 there may or may not have been extensions of those agreements.
17 And I think they are readily available.

18 Why they would be helpful at this juncture while we
19 are in the Rule 12 is a lot of the motion arguments go to what
20 those contracts mean and the distribution system, and I think
21 that would answer a lot of questions for all the parties.

22 Obviously, the court saw the motion by Express
23 Scripts to seal the contract with Rockford. We didn't weigh
24 in on that at the time, but we do believe that there is
25 portions of that contract that should be publicly revealed.

1 But we have that contract, and obviously ESI has it. But we
2 are interested in the contracts between these parties because
3 it is going to help with standing. We argue that Rockford
4 buys direct through Express Scripts because the drugs come to
5 our employees through Curascript, through some consignment or
6 other basis for the manufacturer, and this agreement has been
7 around since 2007, so it is over ten years.

8 It is a finite request.

9 THE COURT: Let me pause you right there.

10 MR. HAVILAND: Yes.

11 THE COURT: So are you saying you need the contracts,
12 amendments, extensions -- contract issues -- to respond to the
13 motion to dismiss?

14 MR. HAVILAND: I don't need them. I think our
15 allegations cover that. But they are raising factual issues
16 that go to the contracts, and I do think it advances the cause
17 of the court to get them sooner rather than later.

18 THE COURT: Okay.

19 MR. HAVILAND: The two other issues I raised with the
20 court before were the FTC file documents that led to the
21 settlement with the FTC for 100 million, and, more
22 importantly, the licensure of Synacthen, a competitive
23 product. We don't have eyeballs from the Plaintiffs' vantage
24 as to where that license is, and it is important for antitrust
25 arguments that that product be licensed and to know where it

1 is going, to know what it is doing in terms of its sales or
2 coming to fruition.

3 Then finally is the Retrophin-Shkreli documents.
4 That's the company, your Honor will remember, that tried to
5 buy Synacthen before Mallinckrodt came in. Both of those
6 cases, the FTC case and the Retrophin case, were settled by
7 Mallinckrodt, and we believe that those files are finite,
8 available.

9 I reread the transcript this morning, your Honor, of
10 our hearing, and you framed it as this: If it was ten servers
11 worth of information, that would be one thing, but if it was
12 some files in Iron Mountain, then my sense is you would be
13 more inclined to allow us to move forward so we can move
14 forward on discovery.

15 It all comes down to burden and proportionality at
16 this point. If those files are available, we would just as
17 soon get started.

18 THE COURT: Okay. Three wholly different types of
19 documents here. Contracts, amendments, agreements,
20 extensions, I would think that shouldn't be too hard.

21 MR. WATSON: Well, let's start with the contracts.

22 THE COURT: That seems like the easiest one to start
23 with. Go ahead.

24 MR. WATSON: It is our position that the motions to
25 dismiss should be decided on the allegations, and if you start

1 producing selected documents that they would like to use in
2 responding to the motion to dismiss --

3 THE COURT: That's why I asked the question.

4 MR. WATSON: -- it opens up a can of worms because
5 there are, obviously, documents we would then want to use to
6 respond to those, and then I think you go well beyond a motion
7 to dismiss.

8 THE COURT: Well, now you are in a summary judgment.
9 So you have got to get your statements of fact, and you get
10 your responses, and then all of what we have done is thrown
11 out the window.

12 MR. WATSON: So that's our position on those.

13 THE COURT: Okay.

14 MR. WATSON: And then the second grouping, as I
15 understand it, is the FTC and Retrophin litigation. I group
16 those two together. Our position remains, as it was before,
17 that we shouldn't have to produce that material until after
18 the court decides that the Defendant -- excuse me, that the
19 Plaintiffs have stated a plausible claim.

20 We think we have very good arguments in our motion to
21 dismiss, and your Honor last time said that all Defendants say
22 that, but the fact of the matter is that we believe that the
23 law is going to support us here, and there are certain costs
24 associated with those documents if we end up having to produce
25 them, namely that there were different law firms involved in

1 both of those matters.

2 Now, you may ask why that matters, and it matters
3 because if we are going to turn them over now, we are going to
4 have to review them ourselves and incur costs that we wouldn't
5 have incurred if we prevail on the motion to dismiss, without
6 those documents ever having been produced.

7 I think we talked -- or I talked a fair amount last
8 time about the fact that Twombly itself arose in the antitrust
9 context and a lot of it had to do with the fact that discovery
10 costs can get out of hand very quickly in an antitrust case,
11 and for that reason Plaintiffs should be forced to prove that
12 they have alleged plausible claims before discovery begins.

13 So we would argue that there should not be any
14 discovery at this point, other than what has already been
15 undertaken, the Rule 26, until a ruling on the motion to
16 dismiss.

17 THE COURT: Okay. So I wrote to myself "Where are
18 the documents kept, how are they kept, how much?"

19 Where, you answered, different firms, and we all know
20 that it is not just the --

21 MR. WATSON: Let me clarify that just so the record
22 is clear. There were different law firms that handled it.
23 There is an e-Discovery firm that is holding the documents
24 right now.

25 THE COURT: Which e-Discovery firm, if you know?

1 MR. WATSON: Greensfelder.

2 THE COURT: Okay. All right. I do a lot of ESI
3 stuff, discussions, CLEs, that kind of thing. I know
4 Greensfelder is involved in all those things. At the CLEs,
5 when people start talking about their cases, I just get up and
6 make sure I don't want to get conflicted out. All right.

7 So let's talk about volume of the FTC and the
8 licensure issue. We know where they are at. We have got them
9 at some firms. We have got Greensfelder has some. What's the
10 volume?

11 MR. WATSON: Honestly, off the top of my head, I
12 can't tell you what the volume is. It is a lot, but it is
13 available electronically. I don't want to mislead the court.

14 THE COURT: Sure.

15 MR. WATSON: We are able to produce it. It is not a
16 warehouse that's full of hard copies of documents.

17 THE COURT: Okay.

18 MR. WATSON: You know, there is going to be
19 additional storage costs, obviously, if we have to produce it,
20 but it is -- both of those sets of documents, as I understand
21 it, are available in electronic format.

22 THE COURT: Okay. You get to go to school on what
23 happened before, and the costs primarily are being borne in
24 that case, luckily, for you.

25 So I'm going to bounce back to you folks, and that's

1 why I asked, do you -- I said -- I think I said do you need
2 the contract documents to respond. You said no or you didn't
3 think so. Again, I don't want to -- we have got a whole
4 briefing schedule going. You said yourself you don't want to
5 end up in a never-ending-pleadings battle.

6 If those documents get attached, and then they want
7 to respond with documents in the reply, well, now it is going
8 to get converted to a summary judgment motion, and now the
9 whole thing is a complete waste of time because they have to
10 do their statement of facts under 56.1, you have to respond,
11 they have to respond to yours and then any additional ones you
12 raised. And then it will be June, and we will be doing
13 pleadings.

14 MR. HAVILAND: So it is not a need, your Honor,
15 because I believe that the complaint is well-detailed.

16 THE COURT: Okay.

17 MR. HAVILAND: It describes the product market. It
18 describes the competition.

19 I have reviewed the arguments because, obviously, we
20 are preparing our opposition. There is a debate about the
21 market. There is a debate about competition, is there harm to
22 competition. We've alleged that. They say it is a facial
23 conclusory allegation. And so we are going to brief that, and
24 the court is going to be presented with that.

25 The files that we are talking about help to answer

1 those questions. The FTC was faced with the same issues in
2 charging Mallinckrodt as a monopolist. Retrophin was arguing
3 "You took the product when we wanted it." So there is a
4 competitor arguing that "We didn't get the product. We would
5 have been able to bring it to market." And as I read their
6 papers, they are arguing those factual positions.

7 So I do step back, like the court suggested.
8 Rule 12, they don't get to do that, but they are doing that.
9 So I'm here now knowing that we are fighting these factual
10 issues.

11 So the way I want to respond to the court is we are
12 going to get there. I believe we are going to get there
13 because some of the things that they argued in the first round
14 of dismissals they are not arguing here. Express Scripts, for
15 instance, is not arguing a lack of directness on the part of
16 Rockford. We thought we would have that issue with them. We
17 don't. They are not arguing that Acument isn't indirect under
18 Tennessee law. I thought we would have that issue. We don't.

19 So there are some issues that have gone away, meaning
20 we are further along to getting a Rule 12 than we were the
21 last time. We want to get moving. We are now almost a full
22 year in this case, and we are getting calls from clients
23 wondering where we are moving.

24 I realize there is a process, and we have been
25 discussing that. I'm trying to give the court a couple of

1 truncated areas that we can start reviewing it, no substantial
2 burden to the defense. Since they are collected, and we all
3 know Greensfelder and these vendors, at some point that gets
4 transferred to us on our nickel, if you will. We are hosting.
5 We are dealing with the issue of having to review.

6 We would rather start that now than start in June
7 because we are going to be that much further behind when it
8 comes to setting that deadline. I think my colleague
9 Mr. Flowers said 14 months, and the question was when do we
10 start.

11 So if there is not a substantial burden, and the
12 documents are electronically available, and they will advance
13 the case, I hear what your Honor says, if we want to use them,
14 we are going to convert it, but we don't know what the replies
15 are yet when we frame the argument as I just did, and they may
16 go there, in which case we can point the court to what the FTC
17 did and Retrophin did.

18 But I want to get started sooner than later. We are
19 now almost a full year, and I think that these three areas are
20 very simple, focused areas to begin discovery. We are not
21 asking any of these companies to go back into their files.

22 THE COURT: So just to beat this dead horse one more
23 time, if you don't need it --

24 MR. HAVILAND: Right.

25 THE COURT: -- the purpose of you wanting to proceed

1 on those three specific areas is for speed of the case, not
2 going to be used for responses to the motions, right?

3 MR. HAVILAND: Correct, your Honor.

4 THE COURT: Okay.

5 MR. HAVILAND: Unless the replies interject a factual
6 issue, in which case we would have to make that call whether
7 we would want to go outside that record.

8 THE COURT: If they do a reply and they start
9 throwing in new evidence outside, well, then that's dirty
10 pool, right? I don't think they are going to do it.

11 Then you are going to come back, and you are going to
12 want to surreply, and you are going to want a rejoinder, and
13 then we will be in August, and we still haven't finished where
14 we are at.

15 MR. HAVILAND: I hear you, your Honor.

16 MR. WATSON: Can I add one thing in response to the
17 speed argument? I will just remind the court that we filed a
18 motion to dismiss back in August. Rather than responding,
19 they filed an amended complaint. When we were about ready to
20 file our motion to dismiss the amended complaint, they filed a
21 second amended complaint.

22 So I submit that that's why we are seven months down
23 the road, not because of anything that the Defendants did or
24 didn't do, and that's perfectly within their rights, but then
25 they shouldn't be here complaining that we are six months down

1 the road and there hasn't been any discovery.

2 THE COURT: Okay. The Shkreli documents, where are
3 they? How much are -- what's the volume? What's the status
4 of them?

5 MR. WATSON: Well, the Shkreli documents are what we
6 called the "Retrophin documents." I assume that's what's
7 being referred to, the documents from that case, which is the
8 civil action. I'm not aware of any Shkreli specific
9 documents.

10 THE COURT: That's the moniker he is using. You can
11 call them "Retrophin." I don't care, just as long as I know
12 it in my head.

13 MR. WATSON: Right. I just want to make sure we are
14 talking about the same thing.

15 THE COURT: Are you talking about the same documents?

16 MR. HAVILAND: That's correct.

17 THE COURT: Okay.

18 MR. HAVILAND: We had talked about the Shkreli
19 criminal case. He has been prosecuted. He is in jail.

20 We are talking about the Retrophin case.

21 MR. WATSON: Right, yes.

22 THE COURT: Okay. All right. So we are talking
23 about volume, location, how they are kept, if you know.

24 MR. WATSON: It is the same. When I was answering a
25 moment ago about FTC, I was talking out --

1 THE COURT: It would have been all there. Okay.

2 MR. WATSON: Right.

3 THE COURT: Okay. I will allow requests to produce
4 on contracts, amendments, extensions. I will allow that to go
5 forward on written discovery.

6 On the other two subjects, I need more information.
7 So talk to whoever you need to talk to at Greensfelder. I
8 need to know volume, megabytes, gigabytes, terabytes.
9 Greensfelder, this is what they do. I'm sure they are kept in
10 ways that can be sliced, diced, and all kinds of things, and
11 maybe they are using TAR and all kinds of fun tools to figure
12 out responsive documents, but I need to know the volume, all
13 right?

14 And then not just the volume, the manner in which
15 they are kept, any burdensomeness, costs to transfer,
16 warehousing, that kind of stuff, I need to know that so I can
17 make an informed decision.

18 MR. HAVILAND: Okay. And, your Honor, if I may, the
19 Plaintiffs are willing to bear the cost once the production is
20 ready. It obviously becomes our discovery burden. We are
21 ahead of ourselves on that with the Rule 12 motion pending.
22 So if we can understand that cost component well enough, we
23 might be able to make it easier to transfer.

24 THE COURT: Okay. There is nothing to stop you folks
25 from talking.

1 MR. HAVILAND: Yes. Thank you.

2 THE COURT: Okay. So you will get written out. You
3 will respond. That will take you to March-ish.

4 Let's have a status, if everybody is available,
5 March 15th, say at 1:30. You will be in the middle of
6 briefing. All 26(a)s will be out. I assume written discovery
7 will be out and either responded to or better sense, and then
8 we will talk to you about those issues that I just addressed,
9 and we will figure out what, if anything, additional we will
10 do while this is pending, while the motions are all being sent
11 to Judge Kapala.

12 MR. HAVILAND: That date is fine for Plaintiffs, your
13 Honor.

14 THE COURT: Does that work?
15 Does that work?

16 MR. WATSON: That is fine for Defendants as well.

17 THE COURT: Mr. Sullivan, does that work for you?

18 MR. SULLIVAN: Yes.

19 THE COURT: Okay. All right. That's what we will
20 do. That will be the plan. Hopefully, the door is shut and
21 we have no other folks in the case until we meet on
22 March 15th, okay?

23 Anything from the Defendants?

24 MR. WATSON: No. Thank you, your Honor.

25 Anything from the Plaintiffs?

1 MR. HAVILAND: No, your Honor.

2 THE COURT: Okay. Have a good day, everybody.

3 (Which were all the proceedings heard.)

4 CERTIFICATE

5 I certify that the foregoing is a correct transcript from
6 the digital recording of proceedings in the above-entitled
7 matter to the best of my ability, given the limitations of
8 using a digital-recording system.

9

10 /s/ Heather M. Perkins-Reiva

February 12, 2018

11

Heather M. Perkins-Reiva
Official Court Reporter

Date

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